

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

ROBERT ANGUS HEATH,

Defendant-Appellant/Cross-  
Appellee.

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UNPUBLISHED

October 14, 2003

No. 238860

St. Clair Circuit Court

LC No. 00-002842-FC

Before: Murphy, P.J., and Cooper and C. L. Levin<sup>\*</sup>, JJ.

PER CURIAM.

Defendant appeals as of right his first-degree criminal sexual conduct conviction, MCL 750.520b.<sup>1</sup> The prosecution cross-appeals, challenging the scoring of an offense variable at defendant's sentencing. We affirm.

Defendant first contends that the prosecution failed to present sufficient evidence to support his conviction. We disagree.

We review the sufficiency of the evidence in a criminal case de novo. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2003). Viewing the evidence in the light most favorable to the prosecutor, we determine whether a rational trier of fact could find the prosecutor proved the essential elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant asserts that the victim's testimony was so incredible as to render the prosecution's evidence insufficient to support his conviction. Defendant points to

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<sup>\*</sup> Former Supreme Court justice, sitting on the Court of Appeals by assignment.

<sup>1</sup> The judgment of sentence did not indicate under which subsection defendant was convicted. The defendant was sentenced to serve six to thirty years.

inconsistencies in the victim's testimony, and to contradictions between her testimony and that of other prosecution witnesses.

Defendant contends that the generally applicable principles that we must resolve all inconsistencies in the prosecution's favor, *Johnson, supra* at 723, and that we may not interfere with the jury's assessment of the victim's credibility, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), should be set aside because this case presents exceptional circumstances under *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998). Defendant asserts that the victim's potentially inconsistent testimony was inherently implausible, and was seriously impeached on every aspect, and that her recollection and statements were marked by uncertainties and discrepancies. *Lemmon, supra* at 643, however, states that "when testimony is in direct conflict and testimony supporting the verdict has been impeached, if 'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,' the credibility of witnesses is for the jury." The inconsistencies in the complainant's testimony do not rise to the level required to justify appellate intervention respecting the jury's verdict. We cannot say that the complainant's testimony could not be believed by a reasonable juror.

Next, defendant contends that the trial court erred in admitting evidence of another alleged sexual assault by defendant to demonstrate a common scheme, system, or plan. We disagree.

A trial court's decision to admit evidence will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). MRE 404(b)(1) allows the admission of evidence of a defendant's other acts for limited purposes:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Defendant asserts there were insufficient similarities between the acts to demonstrate a common scheme or plan. Although defendant stresses dissimilarities between the encounters, MRE 404(b)(1) does not require perfect similarity for admission of other acts evidence to demonstrate a common scheme or plan. *People v Sabin (After Remand)*, 463 Mich 43, 65-66; 614 NW2d 888, on remand 242 Mich App 656 (2000). Here, there were similarities sufficient under *Sabin* to support the trial court's ruling.

Defendant also contends that the prejudicial effect of the other acts evidence outweighed its probative value. The other acts evidence was probative of a common scheme or plan. Defendant has not demonstrated that the prejudicial effect substantially outweighed the probative value. The trial court did not err in admitting the evidence.

Defendant next contends that the trial court improperly instructed the jury regarding the use of the other acts evidence. Defendant's attorney, by expressing satisfaction with the jury instructions, relinquished defendant's right to object to them later, and waived this issue for appeal. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Accordingly, there is no possible error for this Court to review. *Id.* at 216.

Defendant also contends that remarks by the prosecutor during closing arguments constituted misconduct. Defendant failed to object to most of the complained-of remarks. Because in each unobjected to instance an objection could have cured any error, our review is precluded, except concerning two of the remarks. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). With regard to these statements, we review the claim of prosecutorial misconduct de novo, but we review the trial court's factual findings for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Defendant first asserts that the prosecutor improperly vouched for a witness's credibility. The prosecutor however, simply argued that the jury should believe the witness's testimony because she had no motivation to lie, and she had testified consistently. The prosecutor did not indicate she had special knowledge concerning the witness' truthfulness or ask the jury to convict defendant on the basis of the prosecutor's personal knowledge. *People v Bahoda*, 448 Mich 261, 276, 286-287; 531 NW2d 659 (1995). Moreover, the trial court provided an instruction that cured any error.

Defendant also argues that the prosecutor denigrated defendant by stating his wounds appeared to be self-inflicted. The prosecutor, however, merely argued from the evidence and the reasonable inferences drawn therefrom that defendant's wounds were self-inflicted. This did not constitute misconduct. *Bahoda, supra* at 282.

Finally, in a pro per supplemental brief, defendant asserts the prosecution knowingly presented false testimony. We disagree.

While a prosecutor may not knowingly use false testimony to obtain a conviction, and has a duty to correct false evidence, *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998), defendant has not demonstrated that the complainant committed perjury. Although the emergency room physician testified that he did not see evidence of injuries to the complainant's head consistent with her claims that defendant beat her, the physician explained that bruises and other injuries could have appeared later. Although the physician's testimony may have called the complainant's credibility into question, it did not establish that she committed perjury.

On cross-appeal, the prosecution argues the trial court improperly scored an offense variable when it sentenced defendant. We disagree.

Defendant's sentence is controlled by the legislative guidelines, MCL 769.31 *et seq.*. A sentencing court exercises its discretion in scoring offense and prior record variables, and its scoring decisions will be upheld if there is any evidence to support them. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Offense variable 11 (OV-11) concerns the number of criminal sexual penetrations that occurred during the offenses for which the defendant is being sentenced. MCL 777.41. Although defendant testified to four consensual penetrations, the complainant did not so testify and there was reason to doubt defendant's credibility. We therefore conclude that the trial court did not abuse its discretion in scoring OV-11.

Affirmed.

/s/ William B. Murphy

/s/ Jessica R. Cooper

/s/ Charles L. Levin